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Agudosi Ikenna Emmanuel v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–36–02 OF 2013
AZIAH ALI, AHMADI ASNAWI AND ABDUL RAHMAN SEBLI JJCA
24 NOVEMBER 2015

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Criminal Procedure — Appeal — Trafficking — Whether appellant's defence had cast reasonable doubt on prosecution's case — Whether trial judge failed to consider relevant factors — Whether trial judge failed to evaluate evidence of defence in light of prosecution's case — Whether appellant had rebutted presumption of knowledge invoked against him — Whether appellant's conduct was proper ground for inference to be drawn against appellant

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Evidence — Statement — Cautioned statement — Whether trial judge failed to consider statement — Whether statement could be re-evaluated on appeal — Whether statement would have made any difference to outcome of proceedings

E

On 14 May 2011, while the appellant was exiting the arrival hall in the Kuala Lumpur International Airport, he was stopped by a customs officer ('PW6') and directed to a search and scanning area. Upon searching the appellant's bags PW6 discovered two plastic bags, which contained three tapiocas in each bag. When the tapiocas were examined closely they were found to have a cut mark which separated the two parts of each tapioca. Concealed in the tapioca parts were six transparent plastic containing crystalline substances. The crystalline substances discovered were later confirmed by the chemist to be 2,707g of methamphetamine, a dangerous drug. The appellant was arrested and charged with trafficking in the dangerous drug under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The trial judge found that the appellant had custody and control of the bag and its contents and thus invoked s 37(d) of the DDA to presume knowledge of the nature of the drugs on the part of the appellant. In respect of the issue of trafficking the trial judge considered and found that the appellant's acts of concealing and carrying the drugs were within s 2 of the DDA. As such, the trial judge ruled that the prosecution had made out a prima facie case against the appellant and ordered the latter to enter his defence. In his defence the appellant testified that he was a car spare parts trader who had visited Malaysia to purchase spare parts; and that he was carrying the tapiocas for a friend, Criss, who needed help delivering the tapiocas to his brother, Kachi, who was a student in Malaysia. The appellant also claimed that he was shocked to discover dangerous drugs in the cut tapioca parts. In short, the essence of the appellant's defence was that he was an innocent carrier. The

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trial judge rejected the appellant's defence of an innocent carrier and concluded that the appellant's defence had not cast a reasonable doubt upon the prosecution's case. Consequently, the appellant was found guilty, convicted of trafficking and sentenced to death. This was the appellant's appeal that was based primarily on the grounds that the trial judge had failed to evaluate the evidence of the defence in the light of the prosecution's case.

Held, dismissing the appeal:

(1) It was an undeniable fact that at the time of his arrest the appellant was in an enclosed area within the KLIA Complex and that in the circumstances he had no choice but to submit to PW6's authority and to co-operate with the customs officials. Thus, the appellant's submission to authority and co-operation with the officers was no yardstick to gauge the appellant's innocence or his want of knowledge of the incriminating exhibits found on him (see para 17).

(2) Since the appellant adduced no evidence to negate his acts of trafficking and solely relied on the defence of no knowledge of the presence of the drugs in the tapiocas, he had to rebut the presumption of knowledge invoked against him. However, the appellant did not address this core issue but instead went on a frenzy that a reasonable doubt had been created upon the prosecution's case, which was not in alignment with established legal principles. Further, the appellant had all the opportunity to examine the tapiocas carefully but chose not to. His conduct was in effect verily an act of willful blindness and the consequence of that was that he was taken to know. The presumption of knowledge of the drugs invoked against him hence remained unrebutted (see paras 20–22).

(3) The conduct of the appellant was found to be strange and aroused the suspicion of PW6. His strange behavior when exiting the arrival hall in KLIA and later when the bags were searched and the drugs found were relevant facts under s 8 of the Evidence Act 1950 ('the Act') and as such warranted an explanation from the appellant under s 9 of the Act with reasonable fullness of detail and circumstance. In the present case the absence of such an explanation was a proper ground for an inference to be drawn against the appellant that he had the requisite knowledge (see para 23).

(4) Although the trial judge had erred on the application of the law in respect of the appellant's defence for want of knowledge as to the presence of the drugs in the tapiocas, that error had not occasioned any prejudice upon the appellant on account that the trial judge had employed a lower burden ie the reasonable doubt test instead of the higher burden of rebutting on the balance of probabilities whether the appellant had indeed rebutted the said presumption of knowledge invoked against him (see para 25).

(5) Although it is true that the trial judge had not considered the caution statement in her findings, it is trite that an appeal being a continuation of proceedings by way of rehearing empowered the appeal court to review all the available evidence as adduced before it. Having re-evaluated the caution statement, it was clear that it would not have made any difference to the outcome of the proceedings on account of the trial judge's findings. Further, the first opportunity to give notice of the defence by the appellant ought to have been at the point of discovery of the drugs and not at the stage of the recording of the statement. In the circumstances, there could be no doubt that the disclosure of Criss's role, the tapioca and Kachi was a belated disclosure, suggesting concoction (see paras 27–29).

[Bahasa Malaysia summary

Pada 14 Mei 2011, sementara perayu sedang keluar dari balai ketibaan di Lapangan Terbang Antarabangsa Kuala Lumpur, dia telah ditahan oleh pegawai kastam ('PW6') dan diarahkan ke kawasan pemeriksaan dan imbasan. Apabila memeriksa beg perayu PW6 mendapati dua beg plastik, yang mengandungi tiga ubi kayu dalam kesetiap beg. Apabila ubi kayu itu diperiksa dengan teliti ia didapati terdapat kesan potong yang memisahkan kedua bahagian setiap ubi kayu. Tersembunyi dalam ubi kayu adalah enam plastik lutsinar yang mengandungi bahan kristal. Bahan kristal itu kemudiannya disahkan oleh ahli kimia adalah 2,707g methamphetamine, sejenis dadah berbahaya. Perayu telah ditangkap dan dituduh dengan pengedaran dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Hakim perbicaraan mendapati perayu mempunyai jagaan dan kawalan terhadap beg dan kandungannya dan oleh itu menggunakan s 37(d) ADB untuk menganggap pengetahuan jenis dadah pada pihak perayu. Berkaitan dengan isu pengedaran hakim perbicaraan telah mempertimbangkam dan mendapati tindakan perayu menyembunyikan dan membawa dadah adalah di dalam s 2 ADB. Dengan itu, hakim perbicaraan memutuskan bahawa pendakwaan telah membuat kes prima facie terhadap perayu dan memerintahkan perayu untuk memasukkan pembelannya. Dalam pembelaannya perayu membuat keterangan bahawa dia adalah pengedar alat ganti kereta yang datang melawat Malaysia untuk membeli alat ganti, dan bahawa dia membawa ubi kayu itu untuk kawannya, Criss, yang memerlukan pertolongan untuk menghantar ubi kayu kepada saudara lelakinya, Kachi, yang merupakan pelajar di Malaysia. Perayu juga mendakwa dia terkejut kerana menjumpai dadah berbahaya di dalam bahagian potongan ubi kayu. Pendek kata, inti pati rayuan perayu adalah dia merupakan pembawa tidak bersalah. Hakim perbicaraan menolak pembelaan perayu sebagai pembawa tidak bersalah dan menyimpulkan bahawa rayuan perayu tidak menimbulkan keraguan munasabah atas kes pendakwaan. Oleh itu, perayu didapati bersalah, disabitkan kesalahan mengedar dan dihukum mati. Ini adalah rayuan perayu berdasarkan alasan bahawa hakim perbicaraan telah gagal menilai keterangan pihak pembelaan berdasarkan kes pendakwaan.

Diputuskan, menolak rayuan:

(1) Ia adalah fakta yang tidak dapat dinafikan bahawa pada masa dia ditangkap perayu berada di kawasan yang tertutup di dalam Kompleks KLIA dan tersebut dalam keadaan begitu dia tidak mempunyai pilihan tetapi untuk mengemukakan kepada pihak berkuasa PW6 dan bekerjasama dengan pegawai-pegawai kastam. Oleh itu, penyerahan perayu kepada pihak berkuasa dan kerjasama dengan pegawai-pegawai bukanlah kayu ukur untuk mengukur kebersalahan perayu atau keperluan pengetahuannya terhadap ekshibit yang menunjukkan dia bersalah yang didapati padanya (lihat perenggan 17).

(2) Memandangkan perayu tidak mengemukakan keterangan untuk menafikan tindakan pengedarannya dan hanya bergantung semata-mata kepada pembelaan tiada pengetahuan akan kehadiran dadah di dalam ubi kayu, dia hendaklah mematahkan anggapan pengetahuan yang digunakan ke atasnya. Walau bagaimanapun, perayu tidak mengutarakan isu asas ini tetapi tetapi sebaliknya membangkitkan bahawa keraguan munasabah telah diwujudkan atas kes pendakwaan, yang tidak sejajar dengan prinsip undang-undang yang ditetapkan. Di samping itu, perayu mempunyai segala peluang untuk memeriksa ubi kayu dengan teliti tetapi memilih untuk tidak melakukannya. Kelakuannya adalah sesungguhnya kesan daripada tindakan yang disengajakan dan akibat daripada itu dia dianggap mengetahui. Anggapan pengetahuan dadah digunakan terhadapnya oleh itu kekal tidak dipatahkan (lihat perenggan 20–22).

(3) Kelakuan perayu didapati ganjil dan menimbulkan syak terhadap PW6. Kelakuan ganjilnya apabila keluar dewan ketibaan di KLIA dan kemudian apabila beg diperiksa dan dadah dijumpai adalah fakta relevan di bawah s 8 Akta Keterangan 1950 ('Akta') dan yang sebegitu mewajarkan penjelasan daripada perayu di bawah s 9 Akta dengan keadaan dan butiran yang penuh munasabah. Dalam kes ini ketiadaan penjelasan sebegitu adalah alasan wajar untuk satu inferens dibuat terhadap perayu bahawa dia mempunyai pengetahuan yang diperlukan (lihat perenggan 23).

(4) Walaupun hakim perbicaraan telah terkhilaf dalam penggunaan undang-undang berkaitan pembelaan perayu untuk keperluan pengetahuan terhadap kehadiran dadah di dalam ubi kayu, kekhilafan itu tidak menyebabkan apa-apa prejudis ke atas perayu kerana hakim perbicaraan telah menggenakan beban yang lebih rendah iaitu ujian keraguan munasabah bukannya beban yang lebih tinggi mematahkan imbangan kebarangkalian sama ada perayu telah benar mematahkan anggapan pengetahuan yang digunakan terhadapnya (lihat perenggan 25).

(5) Walaupun adalah benar bahawa hakim perbicaraan tidak mempertimbangkan kenyataan amaran di dalam dapatannya, ia adalah biasa bahawa rayuan merupakan sambungan prosiding melalui cara pendengaran semula memberikan kuasa kepada mahkamah rayuan untuk menyemak semula kesemua keterangan yang ada yang dikemukakan di hadapannya. Dengan menilai semula kenyataan beramaran, ia adalah jelas bahawa ia tidak akan membuat apa-apa perbezaan dalam keputusan prosiding disebabkan dapatan hakim perbicaraan. Di samping itu, peluang pertama untuk memberi notis pembelaan oleh perayu sepatutnya telah pada masa penemuan dadah dan bukan di peringkat pencatatan kenyataan itu. Dalam keadaan ini, tidak akan ada keraguan bahawa pendedahan peranan Criss, ubi kayu dan Kachi adalah pendedahan yang lambat, menunjukkan rekaan semata (lihat perenggan 27–29).]

Notes

For cases on appeal in general, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 171–835.

For cases on cautioned statement, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 3063–3099.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Hoh Bon Tong v PP [2010] 5 CLJ 240, CA (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585; [1987] 1 LNS 72 (refd)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d)
Evidence Act 1950 ss 8, 9

Appeal from: Criminal Trial No 45A-339–12 of 2011 (High Court, Shah Alam)

Suresh Thanabalasingam (Suresh Thanabalasingam) for the appellant.
Samihah Razali (Deputy Public Prosecutor, Attorney General Chamber's) for the respondent.

Ahmadi Asnawi JCA:

[1] In the court below, the appellant was charged as follows:

Bahawa kamu pada 14 May 2011, jam lebih kurang 3.45 petang di kawasan

Tuntutan Bagasi C, Balai Ketibaan Antarabangsa, Aras 3, Bangunan MTB, KLIA, Sepang di dalam Daerah Sepang, dalam Negeri Selangor, telah mengedar dadah berbahaya iaitu berat bersih 2702 gram methamphetamine, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a), Akta Dadah Berbahaya, 1952, yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the end of the prosecution's case, the learned trial judge found that a prima facie case has been made out against the appellant on the charge as proffered. The appellant was ordered to enter his defence and at the end of the case for the defence, was found guilty and convicted of the same and was sentenced to suffer the death penalty.

[3] The appeal before us was in respect of the said conviction and sentence. We dismissed the appeal after due consideration of the issues raised and the submissions made in support thereof and affirmed the order of conviction and sentence by the High Court. We now give our grounds.

THE CASE FOR THE PROSECUTION

[4] The narratives are as follows:

(a) on 14 May 2011, PW6 (Sub Insp Ghazali bin Md Din) from the Narcotics Crime Investigation Department, IPD Sepang, and his men were on surveillance duty at carousel C of the baggage claim area, International Arrival Hall, KLIA, when he saw the appellant pushing a trolley moving to exit the hall;

(b) on the trolley were two zipped up plastic bags with red and blue stripes and a small black briefcase;

(c) as soon as the appellant walked in front of PW6, PW6 stopped the appellant and asked for his passport;

(d) PW6 stopped the appellant as his behaviour had aroused PW6's suspicion. The appellant appeared fidgety/restless (*gelisah*), late in arriving from the flight and was constantly observing PW6 and his men;

(e) PW6 then instructed the appellant to bring his bags to the scanning machine. The bags were scanned. PW6 did not find any suspicious images. However, since the appellant was behaving strangely (*berperangai pelik*), fidgety and asked a lot of questions, PW6 ordered the appellant to bring all the bags to Bahagian Siasatan Jenayah Narkotik office at Level 3, for further examination. Sergeant Hairudin and Corporal Rosli accompanied both PW6 and the appellant to the said office;

(f) PW6 examined the two plastic bags (exhs P10(1) and P10(2)). He found three tapiocas in each bag. There were altogether six tapiocas from the two plastic bags;

(g) PW6 then examined each tapioca and found a cut mark (*kesan potong*) at the end of each tapioca. PW6 separated the two parts of each tapioca and in each tapioca he found one transparent plastic packet containing white coloured crystal like substance suspected to be drugs. PW6 marked the sixtransparent plastic packets G1A, G1B, G1C (exhs P11(1)(a), P11(2)(b) and P11(2)(c)) and G2A, G2B, G2C (exhs P11(4)(a), P11(5)(a) and P11(6)(a)). The photographs of the bags, tapiocas and transparent plastic packets are at pp 171–174, of *Jld* 2, *rekod rayuan* (RR);

(h) the appellant was arrested and PW6 subsequently lodged a police report, KLIA, Sepang 5106/11; and

(i) the substance suspected to be drugs were sent to the chemist, PW1 (Dr Vanitha a/p Kunalan) for analysis. She found the same to be 2707g of methamphetamine ('the drugs').

FINDINGS OF THE LEARNED JUDGE AT THE END OF PROSECUTION'S CASE

[5] The learned judge found that the appellant was caught carrying the two bags in which were the tapiocas 'containing' the six plastic packets; the two plastic bags were tied together at the handle with a baggage tag (P28A) which had the serial number QR 128634, the name of the appellant and flight details (a) KUL QR 624/14 and (b) DOH QR 593/13; these details correspond with the details on the baggage claim tag (P28), attached to the appellant's passport and the flight details on both the baggage tag (P28A); and the baggage claim tag (P28) tallies with the flight details in the itinerary ticket of the appellant (P22). As such there can be no doubt that the appellant was found to have custody and control of the bags and its contents. Pursuant to such findings, the learned judge invoked s 37(d) of the Dangerous Drugs Act 1952 ('the Act') to presume knowledge of the nature of the said drugs on the part of the appellant.

[6] In respect of the issue of trafficking in the said drugs, the learned judge considered and found that the appellant's acts of concealing, transporting and carrying the said drugs were acts of trafficking well within the definition of the same under s 2 of the Act. Additionally she found that the large amount of drugs (2702g) surely cannot be for personal use.

[7] She found that the prosecution has made out a prima facie case against the appellant on the charge as proffered and ordered the appellant to enter his defence.

[8] We have no quarrel with the aforesaid findings by the learned judge.

THE APPELLANT'S DEFENCE

[9] The appellant gave evidence on oath and posited that:

(a) he was trading in car spare parts in Nigeria and came to Malaysia to purchase spare parts as he was informed that car spare parts are cheaper in Malaysia;

(b) he brought along with him USD 3750 to buy motor spare parts and had intended to stay in Malaysia for a week. The reservation for his accommodation at City Pudu Hotel was made by his friend;

(c) at the airport in Lagos, he met a friend by the name of Criss, who had waited at the airport for three days to get the help of somebody to carry the two bags containing the six pieces of tapiocas to be delivered to his brother who is a student in Malaysia. He (the appellant) checked the bags and there were indeed yams inside the bags (the appellant referred the tapiocas as 'yam');

(d) Criss told him that is brother's name is Kachi. He was told that Kachi will collect the bags from him when he arrived at the Malaysian airport. Criss gave him Kachi's telephone number and he had it saved in his handphone;

(e) he agreed to carry the bags to Malaysia and had it checked-in, in his name as seen by the baggage tag and baggage claim tag (P28A and P28). Criss offered him USD 200 in return for the favour. He refused though to accept any monies from Criss as Criss is an old friend;

(f) on arrival at KLIA, he was stopped by a custom officer (PW6) as he was exiting the arrival hall. He was asked to go through the scanning machine;

(g) after the scanning, he was told to carry the bags on to the trolley. However, when that was done, he was again asked to put the bags on the table, near the scanning area;

(h) the bags were again examined. He was asked what was inside the bags before they commence checking. He told them there were yams to be given to one Kachi, a student in Malaysia, whose brother, Criss, is his friend. Three men and one lady officer examined the bags;

(i) the lady officer found one of the yam about to break. She pressed the yam and upon examination, she discovered that there was something inside the yam. He was shocked and asked the police what was inside;

(j) he was asked to look inside. He saw white plastic. He did not believed it when the police told him that it was drugs. He was shocked;

(k) he told the police that the yams were given by Criss for him to give it to

his brother, Kachi. He had no knowledge that the yams contains drugs;

(l) he was then taken to a room together with his bags where all the yams were thoroughly examined. They found a transparent plastic packet containing substance suspected to be drugs in each yam;

(m) he tendered his caution statement (exh D34) in evidence, claiming consistency with his evidence in court; and

(n) in brevity, he is an innocent carrier. This is the essence of his defence.

FINDINGS OF THE LEARNED JUDGE AT THE END OF THE DEFENCE'S CASE

[10] The learned judge found the defence which amount to only a denial of knowledge that there were drugs inside the yams is so improbable, not logical and acceptable to the human mind. Her full account are at pp 151–153 of *Jld* 2, RR.

[11] The learned judge also rejected the appellant's defence of an innocent carrier on account that it is his own folly to choose not to carefully examine the yams. Had he done so he would surely have noticed the cut marks on each of the yams as PW6 had noticed the same as soon as the bag was opened (*sejurus selepas beg dibuka*), indicating that each one of them was cut into two parts and that something was not right with the six yams.

[12] The learned judge concluded that the appellant's defence had not cast a reasonable doubt upon the prosecution's case and that the prosecution had proven its case beyond a reasonable doubt. The appellant was found guilty, convicted of the same and sentenced to death.

THE APPEAL BEFORE US

[13] Learned counsel for the appellant canvassed only one ground of appeal, namely that the learned judge failed to evaluate the evidence of the defence in the light of the prosecution's case, in particular:

(a) that the appellant has no knowledge of the drugs inside the six tapiocas;

(b) that the appellant was an innocent carrier; and

(c) that the appellant's defence was supported by his caution statement which was consistent with his testimony in court.

A OUR FINDINGS

[14] It was learned counsel's submission that the appellant does not have knowledge that the contents of the said tapiocas does contain drugs and this evidence is supported by the evidence of PW6 and the appellant. Learned counsel alluded to PW6's evidence who testified that the appellant made no attempt to flee the scene throughout the incident, was very cooperative and had confirmed that the substance was not his the moment the same was discovered.

[15] Learned counsel also alluded to the appellant's testimony that '... I told them in tears that they were given to me by Criss to be given to his younger brother, a student in Malaysia and I did not know anything about it ...' (p 48, *Jld* 1, RR).

[16] Premised upon the above, learned counsel submitted that the learned judge had failed to consider the evidence in totality, in which the said evidence corroborates the defence evidence that he has no knowledge of the drugs.

[17] However, in our view in the context of the events leading to his arrest, the appellant indeed has no place to run. He was in an enclosed area within the KLIA Complex and was surrounded by not less than four officers equipped with full authority to do the needful in the course of enforcing the law entrusted upon them. Hence any person in the appellant's position would think twice before even entertaining any thought of fleeing the scene. The appellant in fact has no choice but to submit to PW6's authority and his men and to co-operate with them. Such submission and cooperation is no yardstick to gauge the appellant's innocence or his want of knowledge of the incriminating exhibits found on him.

[18] Equally, shedding tears when explaining that the tapiocas containing the drugs were given to him by Criss to be given to his brother in Malaysia is no indication of his innocence. Any person with a bit of talent in acting could equally perform the same feat. In addition, PW6, reiterated in re-examination:

> Bila bahan kristal dijumpai dan ditunjukkan kepada OKT, dia serta merta berkata 'No ... No ...'. Reaksi OKT pada masa itu gelisah, kelam kabut.
>
> Crissdan Kochi – tidak ada dibangkitkan oleh OKT, hari ini pertama kali saya dengar nama tersebut. Semasa proses membuka ubi kayu, OKT ada bersama ...

[19] Be that as it may, the learned judge found the appellant to have in his custody and control of the bags and its contents, the six tapiocas and six packets of drugs and thereafter invoked the presumption under s 37(d) of the Act to impute knowledge of the said drugs upon the appellant. The learned judge also found that the appellant's acts of concealing, transporting and carrying the said

drugs all the way from Lagos to KLIA via Doha constitutes trafficking under s 2 of the Act.

[20] Since the accused adduced no evidence to negate his acts of trafficking and solely relied on the defence of no knowledge of the presence of the said drugs inside the six tapiocas, the only issue now is whether the appellant has succeeded to rebut the presumption of knowledge invoked against him. The burden is now shifted upon the appellant to rebut the said presumption on a balance of probabilities, which is a heavier burden than merely raising a reasonable doubt. Learned counsel did not address this core issue but went on a frenzy that a reasonable doubt has been created upon the prosecution's case, which we think is not in alignment with established legal principles.

[21] In connection with the same, the appellant testified that he checked the bags and found there were indeed yams inside the bags. Foraging through his evidence, the circumstances under which he was given the bags containing the yams is this: Criss is just a friend; did not know where he lived; did not meet him often; has been waiting for three days at Lagos Airport to get someone to bring the yams to Malaysia to be given to his brother; and said that yam in Malaysia is more expensive but yet sent only six pieces of yams to be given to his brother. Criss even offered USD200 to the appellant to get the job done. It appeared that Criss was desperate enough to the extent that he was prepared to wait for three days to get someone just to send the yams to Malaysia. These facts taken together must have raise some concern and suspicion of Criss's conduct, in particular the need and desperation to send the yams to his brother in Malaysia.

[22] However, the appellant did not see it fit to examine the yams carefully. PW6 though, found the cut marks at the end part of the six tapiocas in no time. The appellant equally has all the opportunity to examine the tapiocas carefully. If he had done so, he too would surely have noticed the cut marks on the tapiocas and that something was not right with the tapiocas. The appellant did not and chose to deliberately ignore the obvious. His conduct is verily an act of wilful blindness, the consequence of which is he is taken to know – see *Hoh Bon Tong v Public Prosecutor* [2010] 5 CLJ 240 at pp 272–273. The presumption of knowledge of the drugs invoked against him hence remains unrebutted.

[23] The conduct of the appellant who appeared *gelisah* (fidgety/restless) and constantly observing PW6 and his men while on the way to exit the arrival hall which aroused PW6's suspicion, his 'perangai pelik' (strange behaviour) and continuing *gelisah* when his bags were examined at the scanning table and his equally *gelisah* dan *kelam kabut* (chaotic behaviour) when the drugs were found are relevant facts under s 8 of the Evidence Act 1950, which warrants an explaination from the appellant, under s 9 of the same, with reasonable fullness

of detail and circumstance, the absence of which is a proper ground for an inference to be drawn against the appellant that he had the requisite knowledge. We were satisfied that no such explaination was suggested by the appellant.

[24] The learned judge also did not address whether the appellant has succeeded to rebut the said presumption of knowledge invoked against him but threw out the entire defence on the grounds evinced at pp 151–156 of *Jld* 2, RR of which we have no reason to disagree, and found that the defence raised by the appellant had not cast a reasonable doubt upon the prosecution's case. This ruling must necessarily encompassed the finding that the learned judge, on account of the appellant's failure to raise a reasonable doubt, had rejected the appellant's defence of want of knowledge of the presence of the drugs inside the six tapiocas.

[25] In our view, the learned judge had erred on the application of the law but nevertheless the error has not occasioned any prejudice upon the appellant on account that Her Ladyship had employed a lower burden, ie the reasonable doubt test instead of the higher burden of rebutting on the balance of probabilities whether the appellant has indeed rebutted the said presumption of knowledge invoked against him.

[26] Learned counsel complained that the appellant's caution statement which was admitted in evidence (exh D34) wherein the appellant stated that he had no knowledge about the drugs and mentioned at the first instance that it belongs to his friend, Criss,were consistent with the appellant's oral testimony in court but was not considered by the learned judge. Learned counsel also submitted that at this first opportunity, the appellant had given notice of his defence.

[27] It is true that the learned judge did not consider the said caution statement in her findings at the end of the defence's case. However, it is trite that an appeal is a continuation of proceedings by way of rehearing and an appeal court is empowered to review or to re-evaluate all the evidence available as adduced before it — see *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579; *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613 ; [2009] 2 CLJ 800.

[28] Having re-evaluated the said caution statement, we were of the view that had it been considered by the learned judge, it would not have made any difference on the outcome of the proceedings on account of the learned judge's findings, of which we concurred, that the appellant was not an innocent carrier but was guilty of committing a classic case of wilful blindness. Additionally, if the appellant has no knowledge of the drugs, there is no reason for him to be

gelisah and kelam kabut all the way up to the point of the discovery of the said drugs as enumerated in para 23 above. There is no reason to dismiss PW6's evidence on what he saw in respect of the appellant's conduct at the material time.

[29] We were also of the view that the first opportunity to give notice of this defence by the appellant must occur at the point of the discovery of the drugs at Jabatan Siasatan Jenayah Narkotik office and not at the stage of the recording of his statement – see *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46, at pp 61–63; [2009] 3 CLJ 733 at pp 749–750; *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585; [1987] 1 LNS 72. It was the testimony of PW6 that '... Criss dan Kachi – tidak ada dibangkitkan oleh OKT, hari ini pertama kali saya dengar nama tersebut ...'. Again, there is no reason to disbelieve the testimony of PW6 in connection with the same. In our view, there can be no doubt that the disclosure of Criss's role, the tapiocas and Kachi is a belated disclosure, suggesting concoction — see *Teng Howe Sing v Public Prosecutor*.

[30] For all the reasons enumerated above, we found the conviction of the appellant to be safe. We therefore unanimously dismissed the appeal and affirmed the order of conviction and sentence by the High Court.

Appeal dismissed.

Reported by Kohila Nesan